

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BOBOWSKI, ALYSON BURN,
STEVEN COCKAYNE, BRIAN CRAWFORD,
DAN DAZELL, ANGELO DENNINGS,
CHEYENNE FEGAN, SHARON FLOYD,
GREGORY GUERRIER, JOHANNA
KOSKINEN, ELENA MUÑOZ-ALAZAZI,
ELAINE POWELL, ROBERT PRIOR, ALIA
TSANG, and KYLE WILLIAMS, on behalf of
themselves and all others similarly situated,

Plaintiffs.

v.

CLEARWIRE CORPORATION,

Defendant.

Case No. C10-1859 JLR

CANTOR SUPPLEMENTAL
DECLARATION IN SUPPORT OF
MOTIONS FOR FINAL APPROVAL OF
SETTLEMENT (dkt. 69) and FOR FEES,
EXPENSES, AND SERVICE AWARDS
(dkt. 71)

NOTE ON MOTION CALENDAR:
Wednesday, December 19, 2012

I, Cliff Cantor, declare as follows:

1. I am the principal of Law Offices of Clifford A. Cantor, P.C. I am competent to testify and base this declaration on my personal knowledge and the records of my law firm.

2. In *Dennings*, my firm is one of counsel for plaintiffs (except for Mr. Prior). This Court, in its Order Granting Preliminary Approval dated August 24, 2012, appointed my firm as one of class counsel. *See* Prelim. Approv. Order at 3:26 – 4:2 (dkt. 64).

3. Members of the Settlement Class who wished to request exclusion were directed

1 to send their requests to the settlement administrator, The Garden City Group (GCG). *See*
 2 Prelim. Approv. Order at 5:12 (dkt. 64). GCG attested that it received 409 timely requests for
 3 exclusion (plus 4 untimely requests). *See* Keough Suppl. Decl. ¶ 20. Previously, Clearwire
 4 produced discovery estimating that “the class size is roughly 2,733,406.” Thus, the 409 people
 5 who timely requested exclusion constitute less than 0.00015 of the class [409 ÷ 2,733,406 =
 6 0.0001496].

7 4. Members of the Settlement Class who wished to object to the Settlement were
 8 directed to send their objections to me. *See* Prelim. Approv. Order at 6:17 (dkt. 64). I received
 9 seven objections: six on behalf of one person each; and one on behalf of two people. Thus,
 10 there were eight objectors. *See* Cantor Decl. re Objections ¶ 4 (dkt. 83). The eight people who
 11 objected constitute less than 0.000003 of the class. [8 ÷ 2,733,406 = 0.000002968].

12 5. I attested in a previous declaration that the parties’ negotiations leading up to this
 13 settlement were lengthy and hard-fought. Joint Decl. ¶ 30 (dkt. 73). I also described the two-day
 14 mediation before the Hon. Edward A. Infante (Ret.) of JAMS and the months of follow-up
 15 negotiation under Judge Infante’s supervision. *Id.* ¶¶ 30-33. During that negotiation, the figure
 16 that the parties ultimately agreed on as a maximum that Clearwire would pay for fees, expenses,
 17 and service awards — \$2,000,000 in aggregate — was a “mediator’s proposal” that Judge
 18 Infante made, to which the parties agreed.

19 6. Mr. Gordon B. Morgan and Mr. Jeremy De La Garza, represented by Mr.
 20 Christopher Bandas, assert as follows in their objection:

21 “As any settlement administrator will testify, when a defendant requires parties to
 22 file claims, the claims rate will usually be in the one percent range. ... [T]he
 23 latter procedure is likely to produce benefit to only 1% of the class. ... In reality,
 24 the class is likely to recover only about \$1 million

25 Obj. G at 2:5-19 (dkt. 83-7).

26 7. Mr. Gordon B. Morgan and Mr. Jeremy De La Garza’s assertion about a 1%
 27 claims rate is not what is actually happening here.

1 8. “As of November 4, 2012, GCG [Garden City Group] had received 72,488 timely
 2 claims.” Keough Decl. ¶ 20 (dkt. 70). Clearwire produced discovery estimating that “the class
 3 size is roughly 2,733,406.” Thus, as of November 4, 2012, the claims rate was 2.65% [$72,488 \div 2,733,406 = 0.0265$, or 2.65%].

5 9. This rate has been growing as more claims get submitted, and presumably it will
 6 continue to grow until the deadline for submitting claims. As of December 9, 2012, GCG had
 7 received 79,066 claims. Keough Suppl. Decl. ¶ 22. Thus, as of December 9, 2012, the claims
 8 rate was 2.89% [$79,066 \div 2,733,406 = 0.0289$, or 2.89%], close to 3%.

9 10. A claims rate of exactly 3% would amount to 82,002 claims [$2,733,406 \times 0.03 = 82,002$]. The deadline for submitting and/or postmarking claims, as shown on the settlement
 10 website (www.denningssettlement.com), is January 9, 2013. Extrapolating from information in
 11 weekly reports that I received from GCG, it seems probable to me that the claims rate by the
 12 January 9, 2012 deadline will be in excess of 3%.

14 11. Mr. Gordon B. Morgan and Mr. Jeremy De La Garza’s objection quotes a blog by
 15 Mr. Ted Frank, whom they label a “class action expert.” In the quoted language, Mr. Frank uses
 16 an average claim amount of \$50 for this Settlement. Applying Mr. Frank’s \$50 figure (of which
 17 I do not have independent knowledge) to the 79,066 claims as of December 9, 2012 yields an
 18 amount payable as a result of those claims that could be roughly \$3,953,300 [\$50 x 79,066 =
 19 \$3,953,300]. Applying Mr. Frank’s \$50 figure to 82,002 claims — which I consider to be a
 20 probable floor (*see supra* at ¶ 10) by January 9, 2013 — yields an amount payable as a result of
 21 those claims that could be roughly \$4,100,100 [\$50 x 82,002 = \$4,100,100].

22 12. These \$4 million figures do not take into account that many Settlement Class
 23 members will receive a direct financial benefit even without filing a claim: If current subscribers
 24 have fixed-term contracts that they wish to terminate in the future for reasons of speed or quality,
 25 Clearwire will waive the ETFs. Joint Decl. ¶ 9 (under “ETF Waiver”) (dkt. 73). This benefit is
 26 impossible to quantify with certainty because one cannot know the behavior of Clearwire’s
 27 subscribers in the future. However, *if* subscribers with fixed-term contracts terminate in the

1 future at the same pro-rata rate as they terminated in the past, and *if* those terminations are based
 2 on quality or speed of service, I have calculated that the dollar amount of ETFs to be avoided in
 3 the future would be up to \$1,418,518 starting in January 2013. My calculations are based on
 4 confidential data received from Clearwire in discovery. That data and my calculations are
 5 available to be filed under seal or reviewed in camera if the Court requests.

6 13. Thus, the amount that Clearwire will or could actually pay or forego as a result of
 7 this Settlement is the sum of (i) \$3,953,300 as of December 9, 2012 [or \$4,100,100 as an
 8 estimated floor as of January 9, 2013], using Mr. Frank's estimate of \$50 per claim; plus (ii) an
 9 estimated \$1,418,518 in ETFs waived; plus (iii) a combined \$2,000,000 for fees, expenses, and
 10 service awards, if the Court grants Class Counsel's motion; plus (iv) Clearwire's notice and
 11 administration costs, which I do not know. This amounts to \$7,371,818 as of December 9, 2012
 12 [or \$7,518,618 as an estimated floor as of January 9, 2013], exclusive of notice and
 13 administration costs.

14 14. The amount that Class Counsel requested as a fee award is the balance remaining
 15 from \$2,000,000 after deduction of (i) the amount approved for service awards and (ii) the
 16 amount approved for reimbursement of expenses. Fee Mot. at 1 (dkt. 71). If the Court grants all
 17 amounts as requested, the fee award will be \$1,893,616. *See, e.g.,* Joint Decl. ¶ 99 (dkt. 73).

18 15. Class Counsel pointed out that such an award is appropriate under the usual
 19 approaches. *See* Fee Mot. at 4-14 (dkt. 71). The last approach was a percentage-of-the-benefit
 20 cross-check. *Id.* at 13-14. Based on case law, it appears to me to be appropriate to judge fees
 21 based on 25% of the amount *available* to the class as a result of the settlement as opposed to
 22 25% of the amount actually *claimed*. *See* Fee Mot. at 6:15 (dkt. 71); Reply at 8:23 – 9:9. These
 23 cases include *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.2d 1026 (9th Cir. 1997) (“We
 24 conclude that the district court abused its discretion by basing the fee on the class members’
 25 claims against the fund rather than on a percentage of the entire fund or on the lodestar.”) and its
 26 progeny. Nevertheless, the requested fee award is about 25% of even the amount that Clearwire
 27 will or could *pay*. [\$1,893,616 ÷ \$7,518,618 = 0.2519, or 25.19%]. This calculation excludes

1 notice and administration expenses that Clearwire is bearing. It also excludes not-easily-
2 quantifiable programmatic or injunctive aspects of the Settlement. *See, e.g.*, Joint Decl. ¶ 9 (dkt.
3 73).

4 I declare under penalty of perjury that the foregoing is true and correct.

5 Executed on December 12, 2012

6 s/ Cliff Cantor
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15 Certificate of Service
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17 I certify that, on December 12, 2012, I caused the foregoing to be (i) filed with the clerk
18 of the court via the CM/ECF system, which will send notification of filing to all counsel of
record; and (ii) deposited in the U.S. mail, postage prepaid, addressed to Robert Prior, 2016 E.
6th St., Vancouver WA 98661.

19 s/ Cliff Cantor
20 Cliff Cantor, WSBA # 17893
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